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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

## No. 395

UNITED STATES OF AMERICA,

Petitioner,

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY,

Respondent.

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

A more fair statement of the question before this Court would be "Can the Petitioner, the United States, convert a general responsibility clause into one serving to indemnify?"

## STATEMENT OF FACTS

The Government's Statement of Facts is generally correct but borrows heavily from non-record matter. There is nothing in our record for example that tells how Branham was burned, or how much electricity was in the exposed government wire. Our record is clear, however, that there was governmental negli-

gence sufficient for a Federal District Court to award Branham $45,000.00 from the United States.

The fact statement goes on and attempts to lodge a transcript of the Branham trial with this court. Whatever transcript lodged was not a part of the record in this case. We cannot pass on its correctness or official nature. Nor have we been served with any transcript to afford the opportunity to review same.

Certainly, if the court chooses to consider this transcript, it should ascertain the official character and consider the entire record.

## REASONS FOR AFFIRMING THE FIFTH CIRCUIT COURT OF APPEALS

Petitioner has been adjudged negligent. It now seeks indemnity from Respondent based on contract express and implied.

We should first focus on the pertinent clause.

He (referring to Respondent) shall be "responsible for all damages to persons or property that occurred as a result *of his fault* or negligence in connection with the prosecution of the work." (APP 9) (Parentheses and emphasis supplied)

On this clause the Petitioner bases its entire case.

Respondent, Seckinger, gladly assumes its intended responsibility.

However, we are not responsible for somebody else's negligence, nor do we indemnify the wrongdoer therefor in whole or in part.

Such a strained construction would go far beyond the intention of the parties. Petitioner cannot pass the buck when its own contract did not allow it. It cannot seek more than it paid for. Neither party intended a broad indemnity agreement and did not come close to writing it.

The lower court has a long and valuable history of setting sound and liberal guidelines for interpretation of such clauses.

It has properly considered a real indemnity clause rather rare.

"The first of these, . . . is the rare case in which one of two joint actors enters into a formal indemnity agreement agreeing to hold the other harmless in the event the other party is required to respond in damages for its actions even though such conduct be the result of the other party's own negligence." *General Dynamics Corporation v. Adams*, 340 Fed. 2d 271 (CCA 5, 1965).

It has long given liberal interpretation to such clauses.

See *Standard Oil v. Wampler*, 218 Fed. 2d 768 (CCA 5, 1955).

In that case the court dealt with the following clause in pertinent part:

> "Contractor shall indemnify Standard against damages . . . that may arise from Contractor's operations hereunder . . . and Contractor shall carry . . . public liability and property damage insurance . . .".

The court ruled that the intention of the parties to indemnify need not even be particularly stated in the contract, provided it otherwise clearly appears in the language used.

The Fifth Circuit as early as 1958 stated the majority rule.

See *Batson-Cook Company, Inc. v. Industrial Steel Erectors*, 257 Fed. 410 (CCA 5, 1958).

The court there stated that if one assumed liability for another's negligence, it must be stated in plain and indisputable language.

The indemnity clause there reads in pertinent part as follows:

> "Subcontractor assumes entire responsibility and liability for losses . . . in connection with or arising out of any injury . . . in connection with . . . the performance of the work by the Subcontractor . . . and agrees to indemnify . . . Contractor . . . from any and all such losses . . .".

This language was, of course, much stronger than the language now examined. Petitioner would have had a much better argument under the Batson-Cook language.

Nevertheless, the court there refused recovery by the indemnitee.

The Fifth Circuit spoke again in the year 1962.

See *Jacksonville Terminal Company v. Railway Express Agency, Inc.*, 296 Fed. 2d 256 (CCA 5, 1962) certiorari denied 369 U.S. 860.

The court stated:

> ". . . we are bound to interpret a contract in accordance with the natural and ordinary meaning of the language employed therein."

The court then quoted favorably from *Thomas v. Atlantic Coastline Railway Company*, 201 Fed. 2d 167, 169 (CCA 5, 1953) as follows:

> "We think in view of the surrounding circumstances and of the express provision in the contract that the privilege accorded by the lease shall be enjoyed solely at the risk of appellant, that it was unquestionably the intention of the contracting parties to exempt appellee railroad from liability for ordinary negligence in respect to all claims for fire regardless of origin or however resulting."

The lower court, now under scrutiny, therefore, has set forth these two excellent rules to aid it in the construction of the contracts. What better rules could be found?

Applying these rules to the instant case, they properly affirmed the District Court.

We still have before this Court no real indemnity clause. We have only a puny and weak responsibility clause. The words "fully indemnify" and "save harmless" are completely absent.

The scope of the Jacksonville Terminal indemnifying agreement is also broad.

> ". . . arising by reason of or in connection with the occupation and use of the premises . . ."

Ours says only ". . . as a result of his fault in connection with the prosecution of the work . . .".

Therefore, the Jacksonville Terminal clause was a horse of another color. It was a real indemnity clause.

Our clause could never be called an indemnity agreement.

Moreover, the whole situation, or "the surrounding circumstances" were entirely different in Jacksonville Terminal.

In Jacksonville the indemnifying party was leasing the whole terminal. This certainly was a "dominant role" lease to say the least.

It was entirely different from our situation where Seckinger simply went on government property to help install steam lines.

The lower court spoke properly and liberally again in 1962.

See *Southern Natural Gas Company v. Wilson*, 304 Fed. 2d 253 (CCA 5, 1962).

It again applied the rule seeking "the ascertainment of the intention of the parties."

The indemnity clause there dealt with was in pertinent part as follows:

"14 . . . CONTRACTOR shall be responsible for, and shall indemnify the COMPANY against, any and all claims for damage of any kind due to CONTRACTOR'S negligence."

"25 . . . CONTRACTOR shall indemnify the COMPANY against any and all liability or penalty of any kind that may be asserted against the COMPANY on account of CONTRACTOR'S failure, or alleged failure, to comply therewith."

It should be noted that the clause talks about contractor's responsibility, but then goes further on to talk about "and shall indemnify."

The contract there treated responsibility and indemnification as two separate things, and talked about them separately.

Dealing with the responsibility clause followed by the full indemnity clause, the court naturally required that indemnity be allowed.

But there was a real indemnity clause.

The Court spoke again in 1963.

See *American Agricultural Chemical Co. v. Tampa Armature Works*, 315 Fed. 2d 856 (CCA 5, 1963).

The Court here was faced with two responsibility clauses, Article 8(a) and 8(b), and three indemnity clauses Article 8(c), Article 9, and Article 10.

8(a) stated in pertinent part . . . "The Contractor shall be responsible for all work, materials and equipment covered by this contract and, in case of loss or damage prior to the completion and final acceptance of the work . . . shall repair or replace the same at his own expense."

8(b) stated in part . . . "The Contractor shall be responsible for and make good to the satisfaction of the Owner any loss of or damage to existing structures and property belonging to the Owner if such loss or damage is due to the negligence or wilful acts or omissions of the Contractor . . ."

Having covered responsibility, the contract went on to talk about indemnity, and stated in 8(c) in pertinent part . . . "The Contractor shall indemnify and save the Owner harmless from all claims for damage to property other than the Owner's property arising under or by reason of this Agreement if such claims result from the negligence or wilful acts or omissions of the Contractor, its employees, agents, representatives or subcontractors."

Then Article 9 stated in pertinent part . . . "Contractor shall indemnify and save Owner harmless from all claims for injuries to or death of any and all persons including without limitation . . . arising out of or in connection with or by reason of the work done by Contractor, his employees, agents, representatives or subcontractors."

The contract in Article 10 went even further and stated "The Contractor's responsibility for damage to property and injury to or death of persons as set forth in Articles 8 and 9 includes damage, injury, or death caused in whole or in part by any machinery, tools, or equipment belonging to the Owner and used by the Contractor, or his subcontractors, in the performance of this Agreement, or caused by negligence or wilful acts or omissions of any employee of the Owner while such employee is acting under the direction or control of the Contractor or its subcontractors and in his behalf carrying out for him the work to be performed under this Agreement."

To further solidify the parties' intentions, the insuror in that case went on further and agreed by endorsement that "Contractor shall indemnify and save Owner harmless from all claims for injuries to or death of any and all persons, including without limitation, employees, agents and servants of Contractor or its subcontractors, arising out of or in connection with or by reason of the work done by Contractor, its employees, agents, representatives or subcontractor."

The lower court applied the stated rule of construction, and naturally allowed indemnification.

It relied on the express terms of Article 9 to find the indemnity agreement.

It did not find much indemnification intent in Article 8(a) and 8(b).

In fact, it states that Article 8 in no way limits the broad terms of Article 9 and goes on to say that actually the Number 8 clauses did not cover the subject matter of Article 9.

It should here be made crystal clear that the so-called indemnity clause now before this Court is only slightly broader than the Number 8(a) and 8(b) clauses in the American case.

The court states further "Article 9 is the only provision in the contract having to do with injuries suffered by persons in the category of Powell and Nye. It was a normal provision to place in a contract for the protec-

tion of the owner where employees of another would be carrying on their duties on the property of the owner."

The lower court, applying the rule of clear construction, then decided that the indemnitee was entitled to indemnity. They could do very little else with the full blown indemnity clauses.

Thus, this court is presently examining a jurisdiction, the Fifth Circuit, that has a long, well reasoned and well established record of leaning over backwards to grant indemnity when indemnity is intended. It has never in its judicial history arbitrarily refused indemnity on any theory of law, but stands probably in the forefront of all circuits in granting indemnity in a liberal fashion.

Petitioner's position then becomes clear.

They have tried and are trying to sell this weak, puny, responsibility clause as an indemnity clause.

This, despite the fact that the liberal lower court, carefully selected for the test, has made it very clear that it is not that.

This, despite the fact that it does not even sound like an indemnity clause.

The lower court spoke broadly and liberally again in 1963 on the subject of indemnity.

See *Alamo Lumber Company v. Warren Petroleum Corporation*, 316 Fed. 2d 287 (CCA 5, 1963).

And in 1964.

See *Miller and Company v. L. & N. Railroad Co.*, 328 Fed. 2d 73 (CCA 5, 1964).

Suffice it to say, that in both cases the lower court gave every possible opportunity to a broad and affirmative construction of an indemnity clause. Indemnification was granted because and when the parties clearly had intended it.

Thus, the Fifth Circuit has for many years interpreted indemnity clauses in harmony with the early majority rule.

An overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnity's own negligence . . .". 41 Am. Jur. 2d, par. 15 at 701.

It should be repeated here that one has to really torture and stretch our clause to call it one of indemnity.

Not once does it even use the word.

It merely states responsibility as to Respondent's negligence.

Is it too much to require a clause to at least use the word it attempts to imitate?

Certainly if this were a real indemnity clause it would at least contain this one word.

Further, the clause doesn't even say to whom the Respondent will be responsible. Is it the public, the injured party, the Petitioner? Is it anyone injured?

It just seems most unfair to try to make a lion out of this lamb.

Remember also that this contract must be construed most strongly against the Government since they wrote it. *Martin v. American Optical,* 184 Fed. 2d 528 (CCA 5, 1950). See Anno. 175 ALR 18, Sec. 8.

And this contract should be construed in its proper perspective:

> "When we zero in on this particular contract from the standpoint of the position of the parties at the time the contract was made, we find no sign pointing unequivocally to a purpose on the part of a small contractor performing some integral part of a government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily by the active direct negligence of the government simply because some slight dereliction of the Contractor occurred which, among joint

> tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations."

(See opinion, Fifth Circuit, in this case, APP. 20).

Therefore, it seems clear that the two lower courts gave the clause every possible chance but properly rejected it. This decision of four outstanding jurists should not be lightly overturned.

The Government could have easily been indemnified if it wanted to. All it had to do was write in a complete indemnity clause or a partial one. And not hide the clause under the "Permits" clause. See petitioner's brief p. 36.

Certainly, our body of law must adhere to basic standards that allow citizens to assess risks based on plain language. Such is necessary for our economy.

How else can a man bid on the job intelligently and profitably.

"We should not, in the absence of language free from all doubt, conclude that the parties intended the contractor should assume an obligation which for a single act of negligence on the part of the owner, or one of his employees, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." *United States v. Wallace*, 18 Fed. 2d 20 (CCA 9, 1927).

Here Respondent is a small business man. Some say is the backbone of this nation. He works hard, stays up nights and puts in his bid. He bids on the basis of the clear intention of this clause.

Isn't he entitled to protection? How can the Petitioner come before this tribunal and try to make a sleeper out of this clause?

It can only mean exactly what it says.

Petitioner despite its vast and skillful legal apparatus can only get what it paid for.

Why can't the Government, if it desires to be indemnified for its own negligence, write this plainly in the contract? Certainly they have splendid draftsmen available. Certainly they can exclude any risk they desire to exclude, or if they desire partial indemnification, they can state it.

There are countless ways to write a pure indemnity agreement. "Hold harmless," indemnify the United States from any and all losses," "including the second party's own negligence or that of its agents" are just a few of the many. "Indemnify for your part of the injury, and damage" is still another.

An analysis of the cases previously cited show still various other methods.

Whatever the reason might be, the government did not in the contract with Respondent state that Respondent should be responsible wholly or partially for the government's negligence and indemnify it therefor. Having failed to do so, they cannot create the intention in the contract by their unparalleled legal apparatus, and unlimited fiscal resources.

If Petitioner had put a real idemnity clause in initially, the Respondent could have handled the job differently. He would have had to bid higher. He might have provided for additional employees to make sure the Petitioner's negligence was caught before it did any damage.

Countless items could have been done differently if only Respondent had known what Petitioner had in mind and possibly could have afforded the risk which Petitioner now seeks to apply.

Even from another standpoint, we should examine the clause.

The clause states that Respondent shall be responsible for his acts of negligence. What does this mean?

The 6th Circuit states that to be responsible is to be answerable to the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and integrity, and is implied by power. *Ohio Power Company v. N. L. R. B.*, 176 Fed. 2d 385, 387 (CCA 6, 1949).

A Virginia court states that responsible means legally answerable or accountable for discharge of the duty. *Manassas Park Development Co. v. Offutt*, 203 Va. 382, 124 S.E. 2d 29 (1962).

A Circuit Court has held that the word responsible is far from being broad enough to make the party that has agreed to be responsible actually an insuror against all possible contingencies. It was used to mark the time when the liability should commence. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 714 (C.C.A. 7, 1905)

The American College Dictionary states responsible is "answerable or accountable, as for something within one's power, control or management. Involving accountability or responsibility: a responsible position. Chargeable with being the author, cause or occasion of something. Having a capacity for moral decisions and therefore accountable; capable of rational thought or action. Able to discharge obligations or pay debts. Reliable in business or other dealings; showing reliability."

But why must Respondent strain an interpretation of the clause?

The contract must be construed most strongly against Petitioner who wrote the contract. *Martin v. American Optical*, supra.

Construing the agreement most strongly against Petitioner, what was intended by the contract?

Can anyone seriously urge that when Respondent was signing up his plumbing contract and agreed to be "responsible for all damages to persons or property etc." he meant to take care of whatever Petitioner might be held liable for? or a part thereof? or be responsible for the action of the government employees?

"Shall be responsible" is certainly a far cry from "shall indemnify and hold harmless".

How can Petitioner be offering a fair interpretation of the language used?

Still another viewpoint sheds light.

The clause deals with damage to "persons."

Did the Petitioner pay the $45,000.00 to a "person" under the contract?

Was Branham such a person as to be covered by the indemnity clause?

We think not.

Branham was an employee of appellee.

He was dealt with amply and liberally under workmen compensation provisions of the contract. Isn't it a further strained construction to say that this applied to an employee also?

Why would he be dealt with in one section so liberally and again dealt with in another section?

How could the parties have intended this?

To further back off and take a long commonsense look at the government's position, we profit from a genuinely objective view.

The government, in effect, is saying that the United States District Court for the Southern District of South Carolina entered a judgment. No appeal was taken. It now says that the judgment was actually entered against the wrong party since Seckinger, the Respondent was the real culprit.

They say that the real negligent party was the Respondent, yet they stood idly by when the distinguished District Court Judge of South Carolina said they were all wrong. Petitioner naturally had competent defensive trial counsel, who would seize upon the negligence of another as a real impressive defense. Yet the District Court was unconvinced and awarded a judgment against the government alone for $45,000.00.

If Respondent were as negligent as the government now says it is, why did they get stuck for all of it?

The controlling negligence of another is an absolute defense.

How can the government stand idly by when such an injustice is done, let it be done, and then many months later attempt to get the innocent Respondent to share the blame by virtue of a narrow contract and possible implications therefrom.

Isn't the Petitioner actually saying that although they were adjudged negligent, they really were not? Aren't they trying to go behind and change the judgment of the South Carolina District Court?

If we had been so negligent why not use our negligence as a defense? Why not argue that Seckinger was the real party negligent? Remember, Respondent had to be negligent to have breached its alleged agreement with Petitioner, as stated by the lower court". (App. 21)

Certainly the Judge of the District Court in South Carolina would not have awarded $45,000.00 to Branham if a valid escape had been offered.

Under Federal Tort Claim Act, United States of America is liable just like a private person should be. *Arnhold v. U. S.*, 284 Fed. 2d 326 (CCA 9, 1960) Cert. den. 82 Sup. Ct. 122, 368 U. S. 876, 7 L.Ed. 2d 76.

A private person in South Carolina is not liable for someone else's tort.

*Tobias v. Carolina Power Co.*, 190 S. C. 181, 2 S.E. 2d 686 (1939)

Certainly federal law should follow this rule.

Therefore, if we had been so negligent (negligent enough to have breached our contract), the Petitioner would have a wonderful defense to the claim of Branham despite its lack of third party success.

Yet no such defense was apparently offered.

Who ever heard of able government counsel letting a judgment be rendered against the United States when it was actually the tort of an independent contractor.

This is a real knockout punch as a defense.

Thus, for all of the foregoing reasons the Fifth Circuit should be affirmed.

It should be noted that an excellent statement of the background of the law of indemnity can be found in Annotation, 175 ALR on page 12. The article goes into the matter very deeply and thoroughly and particularly at page 144.

Also see Vol. 1, *The Forum*, American Bar Negligence Section pub. p. 1-30 for a 1965 review of the law.

Also a current analysis of the law of indemnity can be found in 42 CJS, Indemnity Sec. 1 et seq., p. 563 et seq. and in 41 Am. Jur., 2d Indemnity, Sec. 13 et seq., p. 697.

All of these authorities likewise would persuade affirmance of the two lower courts.

We should next turn to Petitioner's claim for recovery contained in Count 2. (APP. 5)

Petitioner here seeks recovery upon alleged breach of implied contractual duty.

"12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants, and employees were obligated to perform the work properly, and safely, and to provide workmanlike service in the performance of said work." (APP. 5)

In so doing it tries to bolster the weak language of the contract by the duty raised by the "Ryan" doctrine. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 Sup. Ct. 232, 100 L.Ed. 133, (1956).

Petitioner wants this court to extend Ryan to a subcontractor plumber who is land based.

Even though it might apply, the accommodating arms of the Ryan doctrine do not aid Petitioner in this case.

In order to reinforce this conclusion, the Ryan doctrine should be briefly examined.

As this Court is well aware, the doctrine was born when it dealt with the obligation of a stevedoring company to the shipowner. The obligation resulted from Ryan agreeing to load cargo on the ship. The general agreement was to take care of the ship's stevedoring needs. The stevedoring was not done properly, and as a result a Ryan employee was injured.

The shipowner under its broad liability had to pay the employee $75,000.00, and attempted to get his money back from Ryan. This Court properly allowed it.

The Court in its decision stressed the uncontroverted agreement to perform all of the shipowner's stevedoring operation. It stated that the agreement necessarily included Ryan's obligation, not only to stow the cargo, but to stow it properly and safely so that the ship would be seaworthy.

Applying this rule to our case, the government could certainly not prevail.

Petitioner does not complain of our improper installation of plumbing. It does not complain that one of our steam pipes broke. It does not complain that one of our valves exploded. It only complains that one of Respondent's employees was injured while performing this work.

It says that this injury was caused by: (APP. 5)

(a) Our failure to request that the power distribution line be energized.

(b) Our failure to request that the wires at the place where the accident occurred should be insulated.

(c) Our failure to provide safety insulation on the wires.

(d) Our permitting and directing the injured employee to work in an area where live wires were in close proximity to his place of work.

(e) Our failure to prevent the injured employee from proceeding in a manner that was dangerous and which caused him to be injured.

It should here be made crystal clear that Respondent was not installing wiring.

We were only doing plumbing work. We were doing an outside steam distribution system at Parris Island (APP. 4)

We were only working near the Petitioner's own wires and electrical system at this Marine Base.

Thus, the government is not complaining that we breached the core of our agreement, or that we did not perform our work properly, but they are going one step farther and saying that in the performance of our agreement we used an employee, and exposed him to Petitioner's negligence, or did not insulate him therefrom.

They not only want us to warrant our work, but Petitioner wants us to insure any injury to our employee because of their negligence.

And this by implication.

It goes without saying that if Petitioner prevails in this appeal, they would prevail in almost any case where an employee of a government contractor was injured on government property e.g. even where our employee was run over by a negligent government truck while the truck was driving to the job. Or even possibly when a negligent marine misdirected a grenade.

Remember also that under the general rules governing judgments, an indemnitee seeking recovery from the idemnitor is bound by all findings without which the judgment could not have been rendered, and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor the latter cannot be successfully maintained. See *Annotation 24 ALR 2d., p. 329; Fidelity Company v. Federal Express,* 136 Fed. 2d 35 (CCA 6, 1943).

Therefore, the Petitioner must start with the admission that they are negligent and caused the injury to our employee. We might add that they are $45,000.00 negligent.

Considering further the Ryan case, this Honorable Court went further in explaining its decision. "This obligation is not a quaisi-contractual obligation implied in law or arising out of a noncontractual relation-

ship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, supra.

Thus, if the Petitioner were complaining of defective plumbing work, it might well attempt to apply the Ryan doctrine. However, they make no complaint of the quality of our plumbing work, but merely say that we failed to insulate our employee from Petitioner's own negligence.

How far can they expect us to go?

They suggest, to say the least, a rather strained construction of the Ryan doctrine.

The Ryan agreement was a broad contract, and encompasses many things including loading and unloading. It was a contract of seaworthiness. In our case, we only did a little plumbing job on a big government base. In short, our contract was not a broad and all encompassing as a stevedoring contract, but much more narrow and restricted.

The Court continued the Ryan doctrine in the Weyerhauser case and the Crumady case. *Weyerhauser Steamship Co. v. Nacirema Operating Co., 355 U. S. 563, 78 Sup. Ct. 438, 2 L.Ed. 2d 491 (1958); Crumady v. Joachim Fisser, 358 U. S. 423, 79 Sup. Ct., 445, 3 L.Ed. 2d 413 (1959).*

Nothing in these cases would require an extension of the Ryan doctrine to the instant case.

A later Supreme Court expression of the Ryan doctrine appears in *Societa v. Oregon Stevedoring Co., 376 U. S. 315, 84 Sup. Ct. 748, 11 L. Ed. 2d 732 (1964).*

This again was another stevedoring case. The court held: . . . "the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, . . . including defective equipment supplied by the shipowner, . . . and that the shipowner's negligence is not fatal to recovery against the stevedore."

This case contained an excellent dissenting opinion by Mr. Justice Black, who sounds a warning and states in part ". . . the Court here expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of the law as well as in admiralty. There is no basis in past decisions of this or any other court for the holding that one who undertakes, to do a job for another and is not negligent in any respect nevertheless has an insurer's absolute liability to indemnify for liability to injured workers which the party who hired the job done may incur."

Thus our distinction endures.

We are not dealing with an all encompassing service contract which agreed to furnish all plumbing for the government installation on which the work was done. We are dealing only with a narrow contract to install

a relatively small amount of outside plumbing in accordance with certain plans and specifications.

Certainly, any service contract such as the contract of a stevedoring firm implies many obligations far beyond that of a plumber doing a specified job.

The stevedore takes over the ship and its ingredients of seaworthiness for a time.

The Respondent plumber hardly had command of the Petitioners Parris Island Marine Depot for even a short time.

What if they had tried to take over even the electrical system of Petitioner. Respondent would have probably been thrown in the brig.

This Court in the Ryan case talked about consensual obligation owing to the shipowners. This is a continuation of the warranty of seaworthiness.

What could be more important to a ship to have the cargo continue its seaworthiness? Improper loading will cause improper ballast, and untold risk.

This is why stevedoring is so expensive. You pay the price to have your cargo loaded right so you won't turn over or break up in the middle of the ocean.

However, such a conclusion could not be applied to our situation.

We are performing only a limited and restricted plumbing contract. Petitioner finds nothing wrong with our plumbing. They make no attack on the quality of our work. They try to go five steps further and seek implied indemnity for their own negligence.

The circuit now under scrutiny in 1962 spoke on the subject of implied indemnity and the Ryan doctrine.

See *Halliburton v. Norton Drilling Co.*, 302 Fed. 2d 431 (CCA 5, 1962) 313 Fed. 2d 380, cert. den. 374 U. S. 829, 83 Sup. Ct. 1870, 10 L. Ed. 2d 1052 (1963).

In that case the court dealt with an attempt of one subcontractor to obtain indemnity from another subcontractor. The decision was based on the pleadings only as is our case now before this court.

The court turned to the attempt to collect on implied indemnity and stated: "The initial defect in the appellants' claim based on the theory of implied warranty is that the pleadings are completely devoid of any indication that Norton promised Halliburton that it would remove the cementing head in a careful and workmanlike manner..." "The third party complaint states simply that Norton breached an implied contractual warranty to remove the cementing head in a careful and workmanlike manner. This is a naked conclusion of law, unsupported by the factual allegations of the complaint..."

Thus, if we apply the reasoning of the Halliburton case to our case, the implied warranty theory would have to fall. Our pleadings are also devoid of any

claim that appellant promised appellee that it would perform the plumbing so as to refrain from any of the alleged negligent acts. (APP. 3 et seq)

Nevertheless, this court goes further and attempts to point out the real meaning of the Ryan doctrine. It talks about a much more fundamental reason to refuse indemnification.

The court stated that even if the pleadings had shown a warranty of workmanlike service running from Norton to Halliburton, no indemnification would result.

What do our pleadings show:

"12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants and employees were obligated to perform the work properly and safely and to provide workmanlike service in the performance of said work." (APP. 5)

Thus, it would seem that Petitioner's theory on implied warranty has already been ruled out with good reason.

The court went further, however. It discussed the real reason for not allowing implied indemnity in the case.

It explained that the claim for indemnity by Halliburton was bottomed on the Ryan doctrine of implied indemnity. The court stated:

"These decisions (Ryan doctrine) represent somewhat of a departure from the general rule that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms. *27 Am. Jur., Indemnity, Sec. 15; Jacksonville Terminal Company v. Railway Express Agency, Inc.*, supra."

The court then set forth several reasons for the exception afforded in the Ryan doctrine. They are summarized as follows:

1. Ships are subject to the hazards of Maritime service.
2. Ships are usually in a damaged condition when stevedoring is commenced.
3. Other stevedores have exposed the ship to their services throughout the world.
4. The ship might well be a place of danger even as she docks.
5. The stevedoring contractor knows that all of the foregoing conditions are present.
6. The stevedore usually can remedy their defective condition at the expense of the shipowner.
7. The stevedores hold themselves out as being trained and equipped to cope with these conditions and dangers.
8. The stevedore usually has full use and charge of the ship's loading and unloading equipment.

The lower court held that none of these Maritime considerations were present in the Halliburton case which

was a conflict between two subcontractors on an oil drilling operation.

The court clearly stated: "Certainly, a drilling contractor has no reason to expect that equipment furnished by a supplier to the well may be so defective as to be dangerous to life and limb. Consequently, it is highly unreasonable to assume that a drilling contractor, merely by agreeing to perform its services in a careful and workmanlike manner, intends to immunize the supplier of defective equipment from liability for any losses attributable in whole or in part to such defect. Thus, even if Norton did promise Halliburton, either directly or indirectly, that it would remove the cementing head with reasonable care, we would have difficulty construing this as a promise to indemnify Halliburton for losses traceable directly to a defect in the cementing head, for which defect Halliburton alone would be responsible."

Likewise and with stronger reason our situation.

Can we be charged with anticipation that Petitioner has a defective and dangerous electrical system on its Parris Island base?

The Fifth Circuit analyzed Ryan again in 1965.

See *General Dynamics Corporation v. Adams*, supra.

The lower court there stated (referring to the Ryan doctrine):

"Those cases deal principally with the non-delegable duty of a shipowner to maintain a seaworthy vessel, the breach of which makes him liable without proof of negligence. In each of the cases the act of the stevedoring firm against which the Supreme Court permitted the third party action to proceed, constituted the element of unseaworthiness which fastened the vicarious liability of the shipowner."

Thus, from these two excellent decisions of the lower court, it follows that the Ryan doctrine does not apply to our situation.

The lower court, we submit, should be allowed to continue to keep the Ryan doctrine in its present place.

In order to expand the Ryan doctrine Petitioner seizes on an old stevedoring case and attempts to apply it. *American Stevedores v. Porello*, 67 Supreme Ct. 847, 330 U. S. 446, 91 L.Ed. 1011 (1947).

It should be remembered that this was another general stevedoring contract. As such American was responsible for the general seaworthiness of the ship. They did not go on board the ship to fix the plumbing but went on board to take over the general loading of the vessel with the resulting responsibility of unseaworthiness.

Moreover, the specific wording of the contract was much more general and was considered by an Admiralty Court as an admiralty case. There is no admiralty present in the instant case.

Also, Pirello was decided well prior to the Ryan case and should be read in the light thereof. Further, the specific clause itself supposedly one of indemnity was a great deal broader than our clause. Also, the court was faced by lower court determination that both the stevedore and United States were negligent.

We, therefore, feel that Porello is clearly distinguishable and hardly is persuasive to extend Ryan to the instant case.

## SUMMARY OF ARGUMENT

Four distinguished jurists have heretofore dismissed petitioner's claim for indemnity. The lower Court has a long history of giving every possible effect to such clauses, but here properly rejected same. The clause did not even use the word "indemnity". Such rule is within the general law of indemnity and cannot be bolstered by the Ryan Doctrine which should be confined to admiralty contracts involving larger scopes of operation.

## CONCLUSION

For all of the foregoing reasons we feel that the well-reasoned opinions of the two lower courts should be affirmed. We cannot see any set of facts which if the Petitioner could prove would entitle it to recover under its puny responsibility clause. As stated by the District Court: ". . . the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the Government from its own negligence." Certainly, this excellent decision com-

plimented by affirmance from the Fifth Circuit should not be disturbed.

Respectfully submitted,

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STATE OF GEORGIA )
)
CHATHAM COUNTY )

Service of the foregoing brief has been made as required by depositing sufficient copies thereof properly stamped for Air Mail postage, and properly addressed, to opposing counsel of record,

This ____ day of December, 1969.

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